

IN THE CRIMINAL COURT OF TENNESSEE FOR THE  
THIRTIETH JUDICIAL DISTRICT AT MEMPHIS

MICHAEL DALE RIMMER,                   )  
  )  
PETITIONER,                                )  
  )  
VS.   ) Nos. 98-01034,  
  ) 97-02817,  
  ) 98-07033  
STATE OF TENNESSEE,                    )  
  )  
RESPONDENT.                                )

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THE DEPOSITION

OF

BILL GIBBONS

MARCH 10, 2011

## S T I P U L A T I O N

The deposition of Bill Gibbons,  
taken on March 10, 2011, on behalf of the  
Petitioner in the offices of State of Tennessee,  
Department of Safety and Homeland Security, 23rd  
Floor, Tennessee Towers for all purposes allowed  
under the Rules of Criminal Procedure.

It is agreed that R. Michelle Huskey  
Smith, Court Reporter and Notary Public For the  
State of Tennessee at Large, may swear the  
witness, take his deposition, afterwards reduce  
same to typewritten form.

## A P P E A R A N C E S

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## FOR THE RESPONDENT:

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ALSO PRESENT: M. Chris Pennell

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1 BILL GIBBONS,  
2 the Witness, after having been first duly sworn,  
3 was examined and testified as follows:

4 DIRECT EXAMINATION

5 BY MS. GLEASON:

6 Q. For the record, my name is Kelly  
7 Gleason. I represent Mr. Michael Rimmer in the  
8 case Rimmer Versus State. To my left is Daniel  
9 Kirsch, who is my co-counsel representing Mr.  
10 Rimmer in the case. Mr. Brad MacLean, an  
11 attorney with our office is also present and  
12 assisting me on this matter. And Chris Pennell,  
13 investigator with our office is also present.

14 And on behalf of the State of  
15 Tennessee, John Campbell, the deputy district  
16 attorney for Shelby County District Attorney's  
17 office is present. Mr. Gibbons, when we had  
18 originally subpoenaed you, we had asked in the  
19 duces tecum if you could bring some items  
20 relevant to the disqualification decision, did  
21 you bring anything of that nature with you  
22 today?

23 A. I did not. To my knowledge, there are  
24 no records.

1 Q. Okay. So, no e-mails? No memos?

2 A. No, ma'am.

3 Q. Okay. And could you please state your  
4 full name for the record?

5 A. William Lockhart Gibbons, that's  
6 L-O-C-K-H-A-R-T, Gibbons, G-I-B-B-O-N-S.

7 Q. How are you currently employed?

8 A. I am the commissioner of the Tennessee  
9 Department of Safety and Homeland Security.

10 Q. And what date did you begin that  
11 position?

12 A. January 15th of this year.

13 Q. Previously what was your position?

14 A. I was district attorney general in the  
15 30th Judicial District, which is composed of  
16 Shelby County.

17 Q. And when did you start that?

18 A. I started that in November of 1996. I  
19 cannot give you the exact date in November, but  
20 it's November of 1996.

21 Q. Was that an appointment or an elected?

22 A. That was originally an appointed  
23 position.

24 Q. Did you stand for re-election?

1 A. I did.

2 Q. And when did you end your service as  
3 district attorney for Shelby County?

4 A. January 15th 2011.

5 Q. Would you agree with me that a  
6 district attorney is a minister of justice?

7 A. Yes.

8 Q. And the district attorney of any  
9 particular office is ultimately responsible for  
10 the ethical conduct of the members of the  
11 office?

12 A. I would say so.

13 Q. And while you were district attorney,  
14 you supervised a very large staff, having at  
15 least eighty district attorneys?

16 A. Correct.

17 Q. At times, I believe it may have  
18 exceeded a hundred district attorneys?

19 A. That is correct.

20 Q. And many of the district attorneys  
21 that worked for you were young and experienced  
22 -- young and inexperienced?

23 A. Well, any time someone is hired right  
24 out of law school, I guess you would deem that

1 person young and inexperienced, and we had a  
2 number of people right out of law school, yes.

3 Q. So, you needed to train these young  
4 lawyers?

5 A. Yes.

6 Q. And you needed to educate the younger  
7 less experienced lawyers about their duties as  
8 prosecutors?

9 A. Yes.

10 Q. You needed to make sure that your  
11 young and inexperienced lawyers learn that as  
12 prosecutors, they're ministers of justice?

13 A. Yes.

14 Q. And you needed to make sure that they  
15 understood their duties to disclose exculpatory  
16 evidence under Brady versus Maryland?

17 A. Correct.

18 Q. And you needed to make sure they  
19 understood the obligation under the Tennessee  
20 Rules of Professional Conduct, Special  
21 Responsibilities of a Prosecutor, 3.8 of the  
22 rules, to disclose all evidence favorable to a  
23 defendant?

24 A. Correct.



1           Q.       And you needed to make sure that they  
2 understood their duties to include not  
3 presenting false testimony, and to correct false  
4 testimony immediately if it occurred?

5           A.       Yes. You're asking a lot of specific  
6 questions, but obviously their obligations under  
7 Brady, as well as obligations under the Rules of  
8 Professional Responsibility are things that we  
9 would want to make sure they understood.

10          Q.       And specific to the false testimony,  
11 are you familiar with the line of cases Imbler  
12 versus Pachtman Mooney versus Holohan, to United  
13 States Supreme Court --

14          A.       To some degree.

15          Q.       -- and Napue versus Illinois, and some  
16 of the other cases that talk about the due  
17 process that could -- violation that could  
18 result from that?

19          A.       To some degree.

20          Q.       Yes.

21          A.       I mean, I have not read those cases  
22 recently, but yes, I'm familiar.

23          Q.       And you would want to make sure that  
24 your attorneys understood those as well?

1           A.       I'll answer it this way, we want to  
2       make sure that all of the prosecutors in the  
3       district attorney's office understand their  
4       obligations to do justice.

5           Q.       And so, that would include the  
6       experienced attorneys, you wanted to make sure  
7       that they understood --

8           A.       Correct.

9           Q.       And also that the experienced  
10      attorneys perform their duties as ministers of  
11      justice?

12          A.       Correct.

13          Q.       In a D.A.'s office as large as yours,  
14      with a staff of at least eighty district  
15      attorneys, there should be some sort of system  
16      in place to ensure compliance with their duties  
17      as minister of justice; correct?

18          A.       Repeat that question.

19          Q.       Sure. In an office as large as the  
20      one that you ran, with 80-plus assistant  
21      district attorneys working for you, there needs  
22      to be some sort of system in place in order to  
23      ensure compliance of those attorneys with the --  
24      their duty as ministers of justice?

1           A.       When you say system, I mean, obviously  
2       we want to make sure they are provided the  
3       training and guidance necessary to make sure  
4       they understand their obligations.

5           Q.       Okay. So, that was the means that  
6       your office utilized?

7           A.       Correct.

8           Q.       And in a D.A.'s office, sometimes  
9       there's going to be error on the part of the  
10      assistant district attorney, there should be a  
11      way to address that error?

12          A.       Well, obviously everyone makes errors.  
13      And we, when an assistant D.A. made an error  
14      when I was district attorney, we would address  
15      that error.

16          Q.       And you actually had promulgated an  
17      employee handbook during your tenure, that  
18      reflected the rules of employment in your  
19      office?

20          A.       Correct.

21          Q.       The employment handbook actually has a  
22      lot of different sections, including dress code,  
23      professional expectations, wages, hours, no  
24      sexual harassment, and that sort of thing;

1 correct?

2 A. Correct.

3 Q. And the employee handbook states that  
4 in your office, annual employee evaluations were  
5 conducted?

6 A. I believe that's in the handbook. I  
7 would have to -- I don't have it in front of me.  
8 Maybe --

9 Q. I have a copy, I do. I do.

10 A. Very good. Is this an up-to-date  
11 version of it?

12 Q. I requested that from the human  
13 resources officer in your office in September of  
14 2009, he provided that to me.

15 A. All right.

16 Q. Okay. And the employee evaluations  
17 were designed to identify and correct  
18 weaknesses?

19 A. And strengths.

20 Q. And all assistant district attorneys  
21 in your office were required to acknowledge and  
22 abide by the procedures in the handbook?

23 A. That is correct.

24 Q. In fact, there's a written form when

1       they first receive it, that they have to sign  
2       off on?

3           A.       Correct.

4           Q.       And the employee handbook specifically  
5       specifies that your employees, including  
6       assistant district attorneys served at your will  
7       and pleasure?

8           A.       I would have to go and look at it, but  
9       as I recall, that is correct. If you want me to  
10      look that up, I can.

11          Q.       If you can look it up?

12          A.       But I believe that's correct.

13          Q.       I think it's in the early --

14          A.       I mean, that is a true statement.

15          Q.       Okay. And that means, that if anyone  
16      in your office, including an assistant district  
17      attorney, did not perform their duty  
18      satisfactorily, they were subject to a  
19      termination?

20          A.       Everyone in the office would be. Non  
21      lawyers as well as lawyers.

22          Q.       The district attorney is responsible  
23      for making the decision to seek death penalty in  
24      any particular case when you were the district

1 attorney in your office?

2 A. Correct.

3 Q. Therefore, the district attorney is  
4 aware of every death penalty case in the office?

5 A. Correct.

6 Q. Death penalty cases often attract  
7 publicity?

8 A. When I was district attorney in 30th  
9 Judicial District, that was our procedure, that  
10 is correct.

11 Q. And death penalty cases often attract  
12 publicity?

13 A. Is that a question or a statement?

14 Q. A question.

15 A. Correct.

16 Q. Okay. Due to the high profile of  
17 death penalty cases, you would know about any  
18 death penalty case?

19 A. During the time that I was district  
20 attorney I personally signed off on every death  
21 penalty case.

22 Q. What do you mean signed off, that is  
23 to the death notice, is it also as to the  
24 charge, the indictment charge, first degree

1 murder?

2 A. The district attorney has to sign  
3 every indictment. So, but I would also sign off  
4 on any decision to give the jury the death  
5 penalty as an option.

6 Q. And death penalty cases in your office  
7 were assigned to experienced district attorneys  
8 in your office?

9 A. We --

10 Q. Let's limit that to lead counsel,  
11 we'll try that.

12 A. We basically had a rotating system  
13 under which normally first degree murder cases  
14 would be rotated among the various divisions,  
15 with the division leader taking them. Some of  
16 those would be death penalty cases, some would  
17 not.

18 In addition, we have a number of  
19 special units in the office. Some of those  
20 cases would be assigned to special units, as  
21 well as assigned to other, some of the other  
22 more experienced prosecutors in the office.

23 Q. And death penalty cases result from  
24 constitutional and procedural issues that are

1 not presented in other cases?

2 A. Is that a question or a statement?

3 Q. Would you agree?

4 A. I would agree.

5 Q. And would you agree that experienced  
6 assistant district attorneys are familiar with  
7 the constitutional procedural issues in capital  
8 murder cases?

9 A. They should be.

10 Q. And would you agree that experienced  
11 assistant district attorneys are aware of and  
12 familiar with U.S. Supreme Court and Tennessee  
13 Supreme Court heightened due process  
14 requirements in capital cases?

15 A. They should be.

16 Q. And would you agree that experienced  
17 assistant district attorneys are familiar with  
18 the Tennessee Capital Sentencing Statutes?

19 A. I'll give the same answer, they should  
20 be, yes.

21 Q. And the statutes actually set out  
22 aggravating and mitigating circumstances?

23 A. Right.

24 Q. And how the case is presented in terms



1 of the jury; correct?

2 A. Correct.

3 Q. And experienced assistant district  
4 attorneys are aware of their duty to disclose  
5 exculpatory evidence in capital cases; correct?

6 A. Well, I will answer it this way.  
7 Again, as part of our training, I'm sure that  
8 every assistant D.A. would be aware of the  
9 obligation to do that in any type case.

10 Q. And that -- and the experienced  
11 district attorneys in your office would be  
12 familiar with the criminal discovery rules,  
13 which Rule 16 is the criminal discovery rule?

14 A. They should be.

15 Q. And well, are they?

16 A. Well, I'll simply answer they should  
17 be. That's part of their training. And you  
18 know, whether a specific assistant D.A. is aware  
19 of a specific provision, I can't answer that.  
20 But I would think it's safe to say that they  
21 would be familiar with that.

22 Q. And an experienced district attorney  
23 would be aware of the duty to disclose all  
24 favorable evidence as required by the Rules of

1 Professional Conduct, 3.8?

2 A. I would think so.

3 Q. And given your emphasis on training,  
4 that would be an important area in which to  
5 train your attorneys; correct?

6 A. Sure, and we have.

7 Q. You agree with me, it is important  
8 that the assistant district attorney on the case  
9 comply with his ethical duties as prosecutor?

10 A. It's important in any case.

11 Q. Would you agree with me that it's  
12 important that the assistant district attorney  
13 on a death penalty case comply with Brady  
14 obligations?

15 A. Again, it's important in any case.

16 Q. And would you agree that it's  
17 important in a capital case, that the assistant  
18 district attorney act with candor and honesty?

19 A. I would give the same answer, that  
20 would be important in any case.

21 Q. And would you agree that it's  
22 important in a death penalty case, for an  
23 assistant district attorney to comply with the  
24 Rules of Professional Conduct, 3.8?

1           A.       I would give the same answer.

2           Q.       If an assistant district attorney in  
3       your office violated these disclosure rules  
4       under Brady, it would be important for you to  
5       know about?

6           A.       Well, yes. But I would have to ask  
7       you, are you asking whether an assistant  
8       knowingly violates or unknowingly violates? I  
9       would make some distinction there.

10                  I mean, as you pointed out a few  
11       minutes ago, everybody makes mistakes, and  
12       sometimes things are overlooked. I'm sure that  
13       has happened in some situations where maybe that  
14       was not brought to my attention. I wouldn't  
15       know.

16                  But obviously if a prosecutor  
17       knowingly violates his or her obligation, that  
18       would be something that obviously I would want  
19       to know about.

20           Q.       So, you would not want to know about  
21       it if it was a Brady violation --

22           A.       Well, I'm saying --

23           Q.       -- by one of your assistants --

24           A.       I'm saying that there may be a

1 situation where that assistant himself or  
2 herself does not know it. There could be some  
3 situations where the prosecutor maybe has not  
4 revealed Brady material unknowingly.

5 Q. But --

6 A. It occurs.

7 Q. But if it occurred and it was caught  
8 and it was recognized by either that prosecutor  
9 or by someone else, it would be important for  
10 you to know about it?

11 A. It would be important for that  
12 prosecutor to take the appropriate steps, I'm  
13 sure. To put this in context, during the time  
14 that I was district attorney, we handled well  
15 over a million cases. But I'm sure there were  
16 thousands of cases in which material became  
17 available during the course of a case where a  
18 prosecutor felt an obligation to reveal that  
19 material.

20 Now, do I know of all of those cases?  
21 Of course not. I can't keep track of over a  
22 million cases.

23 Q. But, if it were discovered by a senior  
24 member of your staff, by the court, by someone

1     else, that Brady evidence was not disclosed, it  
2     would be important to you to know that, would it  
3     not, as the district attorney in the office?

4           A.     If that prosecutor knew about it, and  
5     knowingly did not disclose Brady information,  
6     the answer is yes.

7           Q.     So, it's not important to you if a  
8     prosecutor negligently fails to disclose Brady  
9     evidence?

10          A.     Well, we're kind of going  
11     back-and-forth on this. Let me say it this way:  
12     There may be situations where a prosecutor was  
13     unaware of Brady material and did not disclose  
14     it because he or she was not aware of it. In  
15     that situation would -- I would not know about  
16     it, that prosecutor would not know about it.

17                  So, I can't tell you that it's never  
18     happened. I mean, over -- with over a million  
19     cases, it may very well have happened at some  
20     point.

21          Q.     That wasn't my question. My question  
22     was: If it was discovered by Mr. Campbell  
23     supervising a younger attorney, by Mr. Campbell,  
24     who was your deputy for a while, by a court

1 making a finding, if it was discovered, would it  
2 be important to you to know that?

3 A. It would be important for that  
4 prosecutor to reveal that information. I think  
5 I'm answering your question. I hope I am.

6 Q. Okay. That's --

7 A. I guess what I'm saying is, that  
8 happens probably on a regular basis, and the  
9 prosecutor discloses that information. That  
10 isn't necessarily brought -- was not necessarily  
11 brought to my attention each time. It was in  
12 the normal course of handling a case.

13 Q. And do you agree that if an assistant  
14 district attorney in a death penalty case  
15 violated his ethical obligations, that that  
16 would be a problem in the office?

17 A. If a prosecutor knowingly violates his  
18 or her ethical obligations in any case, that  
19 would be a problem.

20 Q. And if that happened in a death  
21 penalty case, that would be a problem that the  
22 district attorney should address?

23 A. Again, in any case.

24 Q. Okay. But that would be something if

1       it were brought to your attention while you were  
2       district attorney, that you believe you should  
3       address, or do you believe you should not  
4       address?

5           A.       Sure, that I should address.

6           Q.       Okay. Now, while you were district  
7       attorney you assigned several death penalty  
8       cases to Tom Henderson, for the record that is  
9       Thomas D. Henderson?

10          A.       Yes, I assigned various cases to him,  
11       that is correct.

12          Q.       And at that point when you began in  
13       1996, Tom Henderson was a seasoned, experienced  
14       assistant district attorney?

15          A.       Correct.

16          Q.       When you started in November of 1996,  
17       Tom Henderson had already been with the office  
18       for twenty years?

19          A.       That sounds about right.

20          Q.       If the record reflects he started in  
21       July of 1976, then he would have been there at  
22       least twenty years?

23          A.       Correct.

24          Q.       Okay. And he had already tried

1 numerous death penalty cases?

2 A. Correct.

3 Q. You trusted Tom Henderson as an  
4 experienced well-trained prosecutor?

5 A. Absolutely.

6 Q. And on May 28th 1998, you promoted Tom  
7 Henderson from his position as one of the two  
8 attorneys in the major offense charging  
9 homicides, to special projects and policy  
10 assistant?

11 A. I don't recall if that was the date or  
12 not. I really -- I don't recall that.

13 Q. If testimony from Mr. Boyd, who had in  
14 his possession Mr. Henderson's personnel file,  
15 indicated that there was a memo dated May 28th  
16 1998, you wouldn't dispute that; correct?

17 A. No.

18 Q. In his previous job, do you recall  
19 what the responsibilities at that time would  
20 have been for the two attorneys in the major  
21 offense charging unit for homicide?

22 A. Basically his responsibility in that  
23 position was to work with the appropriate  
24 investigative agencies to sign off on any



1 homicide charge, prior to that charge being  
2 made, to essentially review the evidence with  
3 the investigating officers and make a decision  
4 as to whether or not there was sufficient  
5 evidence to proceed.

6 Q. And in your May 1998 memo promoting  
7 Mr. Henderson, you said his duties would include  
8 developing and coordinating a comprehensive  
9 training program for prosecutors in the office?

10 A. I haven't seen that document in over  
11 ten years, but if it says that, I'd certainly  
12 not dispute that.

13 Q. Okay. And a comprehensive training  
14 program for prosecutors, which you've already  
15 discussed to some extent, includes training on a  
16 prosecutor's duty as minister of justice?

17 A. Correct.

18 Q. And you would agree that a  
19 comprehensive training program for prosecutors  
20 includes training on the prosecutor's duty to  
21 disclose Brady evidence?

22 A. Correct.

23 Q. And would you agree that a  
24 comprehensive training program for prosecutors

1     also includes training on the prosecutor's duty  
2     to disclose all evidence favorable to the  
3     defendant under the Rules of Professional  
4     Conduct 3.8?

5           A.     Correct.

6           Q.     You trusted Tom Henderson to know  
7     these obligations and to teach them to your  
8     prosecutors?

9           A.     Yes, I trusted him. And as I recall,  
10    I attended a number of training sessions when he  
11    did exactly that.

12          Q.     And in your May 28th 1998 memo, you  
13    said that, quote, now Tom will no longer serve  
14    as a division leader as of September 1. He will  
15    continue to schedule homicide cases and prepare  
16    and try certain key cases; is that correct?

17          A.     Again, I have not seen that document  
18    in over twenty years.

19          Q.     We can pull it out if you'd like to  
20    see it.

21          A.     But I would not -- that sounds  
22    correct, and I would certainly not dispute that.

23          Q.     And you as district attorney did  
24    annual reports on the office; correct?

1 A. Correct.

2 Q. And in your annual report on the  
3 office for the year 2000, the organizational  
4 chart shows Tom Henderson reporting directly to  
5 you; correct?

6 A. Let's see. That is what the  
7 organizational chart shows.

8 Q. And there have been other times where  
9 Tom Henderson actually reported to Mr.  
10 Challen [phonetic] instead of directly to you;  
11 correct?

12 A. I believe that is correct.

13 Q. And then Mr. Challen would report  
14 directly to you?

15 A. Correct.

16 Q. Okay. In the annual report Mr.  
17 Henderson's duties were listed as those  
18 directing violent crime prosecutor's unit, would  
19 you like to see that?

20 A. Yes, it would appear that in 2000,  
21 again, it's been over ten years, that Mr.  
22 Henderson basically was performing three roles.  
23 One, he was director of our violent crime  
24 prosecutor's unit; number two, he was our

1 training director; and number three, he was  
2 handling various other special projects that I  
3 would assign to him.

4 Q. And what would his duties be as  
5 director of the violent crimes prosecution's  
6 unit?

7 A. As I recall at that time, we had  
8 placed under the -- under that particular unit,  
9 various types of cases to which our no plea  
10 bargaining policy applied. And that would have  
11 been first and second degree murders,  
12 aggravated, and especially aggravated robberies,  
13 and aggravated rape.

14 Q. And in this annual report regarding  
15 the office's training program, you state that  
16 the training supervised by Tom Henderson  
17 consists of a monthly half-hour case law update,  
18 followed by a half-hour presentation on a  
19 particular legal topic?

20 A. I believe that's correct.

21 Q. And the training according to the  
22 annual report, was designed to, quote, improve  
23 performance and professionalism, close quote?

24 A. I think that's an accurate summary of

1       it.

2           Q.       And in the report you state that  
3       quote, it is the obligation of all professionals  
4       to keep abreast of developments in their  
5       profession, close quote.

6           A.       Is that a question.

7           Q.       Is that an accurate reflection of your  
8       goals for the training program?

9           A.       I think that would be a pretty  
10       accurate description, yes.

11          Q.       And the annual report also says,  
12       quote, this is especially true of the profession  
13       prosecution, since that profession serves the  
14       public, close quote. Is that an accurate  
15       reflection of your goals for the program?

16          A.       Yes, sir.

17          Q.       And the purpose of it?

18          A.       Yes.

19          Q.       And it was your responsibility as  
20       district attorney to see that the attorneys kept  
21       abreast of the law; correct?

22          A.       Well, that's why I appointed a  
23       training director. I can't answer this for  
24       sure, but I'm not sure prior to my service that

1 the office had a training director. Mr.  
2 Campbell could probably answer that better than  
3 I could.

4 But I thought it was important to have  
5 a training director, so that prosecutors in the  
6 office, one, understood the law; and two,  
7 understood their responsibilities.

8 Q. And you entrusted that role and  
9 responsibility to Tom Henderson?

10 A. At least in 2000 I did. That  
11 responsibility fell on the -- fell to some other  
12 people later on.

13 Q. And because Mr. Henderson reported  
14 directly to you during this time period, you  
15 completed his annual employee evaluation on  
16 August 31st 2001, and reviewed his performance  
17 as special assistant in his -- in that  
18 evaluation; correct?

19 A. I can't remember. But if you have a  
20 copy of it and my signature on it, it speaks for  
21 itself.

22 Q. Okay.

23 A. That actually does appear to be my  
24 signature on it.

1           Q.       Okay. And in this annual employee  
2 performance evaluation, you rated Tom Henderson  
3 at the highest possible level for knowledge of  
4 his work. In fact, the categories go from one  
5 to four, with four being the highest possible  
6 rating of an employee. And under Number 4, the  
7 extent of knowledge displayed by that individual  
8 is listed as expert; correct?

9           A.       Correct.

10          Q.       Okay. Tom Henderson is an expert  
11 prosecutor, with the highest level of knowledge  
12 in the law and ethics that guide prosecutors?

13          A.       Is that a question --

14          Q.       Yes.

15          A.       -- or a statement?

16          Q.       In your review.

17          A.       In my opinion, yes.

18          Q.       And you rated Tom Henderson at the  
19 highest possible level for organization of his  
20 work, and for that category, his level would be  
21 quote, extremely precise in his work?

22          A.       Correct.

23          Q.       And that was your impression and that  
24 was your rating of Mr. Henderson?

1           A.       Correct.

2           Q.       And you rated Tom Henderson an  
3 evaluation at the highest possible level for  
4 good judgement?

5           A.       Correct.

6           Q.       And you trusted Tom Henderson to  
7 exercise good judgment in all the cases he  
8 prosecuted?

9           A.       That is correct.

10          Q.       On September 1, 2006 you promoted Tom  
11 Henderson to administrative assistant in charge  
12 of the criminal courts for the D.A.'s office, do  
13 you recall that?

14          A.       I don't recall that specific date, but  
15 during that time period, yes, I did give him  
16 that assignment.

17          Q.       And that's a very high level of crime  
18 cases in the office?

19          A.       Yes, it is.

20          Q.       And you expected Tom Henderson to  
21 comply with his ethical and constitutional  
22 duties as a prosecutor?

23          A.       I expect every prosecutor to comply  
24 with those duties.



1           Q.       And if a complaint was filed in court  
2       that Tom Henderson violated his duties under  
3       Brady in a death penalty case, you should have  
4       been made aware of that?

5           A.       If he violated his duties in a  
6       particular case?

7           Q.       Correct.

8           A.       Yes.

9           Q.       And if a complaint was filed in court  
10       that Tom Henderson elicited false testimony in a  
11       death penalty case, you should have been made  
12       aware of that?

13          A.       Yes.

14          Q.       And if a court found that Tom  
15       Henderson had violated his duty to disclose  
16       favorable information, you would have been made  
17       aware of that?

18          A.       Yes.

19          Q.       And if a court found that Tom  
20       Henderson violated his duty to disclose  
21       favorable information, it was your  
22       responsibility to take corrective action?

23          A.       Well, again, are you saying that  
24       knowingly, that knowingly found that he failed

1 to fulfill that obligation, or unknowingly?

2 Q. I'm saying that if you learned that  
3 Tom Henderson violated the Rules of Professional  
4 Conduct, Special Responsibilities of a  
5 Prosecutor, 3.8, to disclose favorable evidence  
6 to a defendant, whether you believe that under  
7 Rules of Professional Conduct 5.1, as his  
8 supervisor and administrator of office, that you  
9 had a duty to take corrective action and avoid  
10 or mitigate any damages?

11 A. Again, are you saying that he  
12 knowingly -- are you talking about a situation  
13 where he knowingly?

14 Q. I'm saying -- I'm taking intent out of  
15 it, and I'm saying that a court found that he  
16 did not disclose favorable information as he was  
17 required to do under the Rules of Professional  
18 Conduct?

19 A. So, what is your question?

20 Q. My question is: If a court found  
21 that, whether you believe you had a duty to take  
22 corrective action.

23 A. Can I see the rule for a minute?

24 Q. Sure.

1           A.       I'm sorry, what exception of the rule  
2 are you referring to?

3           Q.       A, B -- Section A, B and C, sub 22.

4           A.       Okay. I believe you're referring to  
5 the section that a lawyer knows -- wait a  
6 minute. The section you pointed me to says, a  
7 lawyer shall be responsible for another lawyer's  
8 violation of the Rules of Professional Conduct  
9 if the lawyer knows of the conduct at the time  
10 and that the consequences can be avoided or  
11 mitigated, but fails to take reasonable remedial  
12 action.

13          Q.       Correct.

14          A.       Okay. So, what's your question?

15          Q.       My question is, whether, as district  
16 attorney, if you learned that a court had found  
17 that Tom Henderson had violated the Rules of  
18 Professional Conduct 3.8 to disclose favorable  
19 evidence, whether you believe that you had a  
20 duty to take corrective remedial action?

21          A.       Well, I'm not -- maybe we're reading  
22 two different provisions of the rule. The way  
23 I'm reading this is, if I knew of the conduct at  
24 the time when its consequences could be avoided,

1 I would need to make reasonable efforts to  
2 ensure that that lawyer conformed to the rules.

3 So if I'm aware that a particular --  
4 at the time that I was D.A., that a particular  
5 prosecutor was not, for example, disclosing  
6 Brady material when he should, I would have an  
7 obligation to make sure that he did that.

8 Q. And you've heard of the case Dan Jones  
9 versus State?

10 A. Yes.

11 Q. As D.A. as we discussed earlier, you  
12 were the one ultimately responsible for the  
13 decision to seek an indictment for first degree  
14 murder?

15 A. Correct.

16 Q. And as D.A. you were ultimately  
17 responsible for the decision whether or not to  
18 seek a death sentence?

19 A. Correct.

20 Q. Tom Henderson was the lead prosecutor  
21 assigned to that case?

22 A. I believe that is right.

23 Q. And Tom Henderson was the lead  
24 prosecutor in that case, assigned to providing

1 discovery under the criminal rules?

2 A. Assuming he was the lead prosecutor in  
3 that case, and I believe he was, that would be  
4 true.

5 Q. And that would also mean that Tom  
6 Henderson as lead counsel was responsible for  
7 disclosing information, information favorable to  
8 the defendant under the TRPC 3.8?

9 A. Correct.

10 Q. And he would also be the attorney  
11 responsible for disclosing information favorable  
12 to the defendant under the Right to Due Process  
13 and the Brady-McCarro [phonetic] line of cases;  
14 correct?

15 A. Correct.

16 Q. Okay. The Dan Jones case went to  
17 trial in December of 2006, you were the  
18 district --

19 A. If you say -- I don't recall the date  
20 of that.

21 Q. Yes. If the records in this case  
22 reflects that the Dan Jones case went to trial  
23 in December 2006, you would not disagree with  
24 that?

1           A.       I would not disagree with that.

2           Q.       Okay. And you were -- this was  
3 actually two months after you had promoted Tom  
4 Henderson to his job as special assistant of the  
5 criminal courts?

6           A.       Based on the -- our -- the previous  
7 question you asked regarding when he assumed  
8 that position, that sounds right.

9           Q.       And you were the Shelby County  
10 district attorney at that time?

11          A.       Correct.

12          Q.       And Tom Henderson prosecuted the case  
13 at trial, it went --

14          A.       I believe he did.

15          Q.       The judge had to declare a mistrial in  
16 the Dan Jones case in December of 2006, were you  
17 aware of that?

18          A.       Yes.

19          Q.       The judge found that Tom Henderson had  
20 violated his discovery obligations by failing to  
21 disclose photographs to the defendant, were you  
22 aware of that?

23          A.       I'm not aware of the -- that  
24 specifically, but I was aware that there was a

1       mistrial.

2           Q.       And let's see, what I can do, the  
3       record has been expunged in this case, but this  
4       is the Court of Criminal Appeals order  
5       addressing that if you would like to review it.

6           A.       Okay.

7           Q.       For the record, the Judge has already  
8       taken judicial notice of this order, ordered the  
9       Court of Criminal Appeals order on a  
10      (unintelligible) on the question of whether  
11      double jeopardy barred retrial of Dan Jones, and  
12      the Court declined to (unintelligible). And in  
13      that order, the Court of Criminal Appeals noted  
14      that the judge also found --

15          A.       I'm sorry, can you let me read --

16          Q.       I'm sorry. Sure.

17          A.       I can't listen to your question and  
18      answer and read it at the same time.

19          Q.       Okay. Certainly.

20          A.       Okay.

21          Q.       Okay. And so you can see from the  
22      order, not only was the mistrial because of the  
23      discovery violations committed by Tom Henderson,  
24      the judge also found that Tom Henderson violated

1 his obligation to disclose exculpatory  
2 statements to the defendant; is that correct?

3 A. The way I read this, what the order  
4 says, is that the trial court declared a  
5 mistrial because of certain statements were  
6 deemed to be exculpatory; that is correct.

7 Q. And?

8 A. I do not find in this order, anything  
9 indicating any intentional wrongdoing on the  
10 part of Mr. Henderson.

11 Q. Were you made aware of the mistrial in  
12 the Dan Jones?

13 A. At the time, yes.

14 Q. Were you aware, or made aware of the  
15 Court's finding that he violated Brady?

16 A. You know, I really can't recall  
17 everything I was told at that time. I may have  
18 been told the details of that; I may not have,  
19 But I was aware that there was a mistrial.

20 Q. And you did not remove Tom Henderson  
21 from his position as administrative assistant in  
22 charge of criminal courts?

23 A. No, I did not.

24 Q. And you did not place any reprimands



1 in Tom Henderson's personnel file as a result of  
2 this Brady and discovery violation?

3 A. Absolutely not.

4 Q. And you did not remove Tom Henderson  
5 from the prosecutor, the prosecutor in that  
6 case?

7 A. Absolutely not.

8 Q. In 2010 when the case was set for  
9 retrial, Dan Jones --

10 A. And let me say again, I do not find  
11 anything in this order reflecting any  
12 intentional act on the part of Mr. Henderson.

13 Q. In 2010 when the case was set for  
14 retrial, Dan Jones moved to disqualify Tom  
15 Henderson as the prosecutor in that case, do you  
16 recall that?

17 A. Yes.

18 Q. And your office opposed the motion to  
19 disqualify?

20 A. Correct.

21 Q. And you as the district attorney made  
22 the ultimate decision to oppose the  
23 disqualification?

24 A. Correct.

1 Q. The Dan Jones case was retried in  
2 November 2010, do you recall that?

3 A. Yes.

4 Q. And Tom Henderson was the lead  
5 prosecutor in that case?

6 A. Correct.

7 Q. And you chose to keep Tom Henderson as  
8 the lead prosecutor in that case; correct?

9 A. Correct.

10 Q. And once again Tom Henderson and you  
11 sought the death penalty in that case?

12 A. As I recall, that's correct, yes.

13 Q. You sought a first degree murder  
14 conviction, and then asked that if that was the  
15 jury's finding, that he receive the death  
16 penalty?

17 A. As I recall, we did give the jury that  
18 option.

19 Q. And Dan Jones was acquitted in  
20 November of 2010?

21 A. I believe that is correct.

22 Q. Okay. In regard to the discovery  
23 violations and the Brady violations that the  
24 Court found that Mr. Henderson committed.

1 A. In the Dan Jones case?

2 Q. In the Dan Jones case. Did you  
3 conduct any investigation into why there was a  
4 Brady violation?

5 A. I really don't recall if I did at the  
6 time. Again, there was, if I recall, there was  
7 no indication that there was any intentional act  
8 on the part of Mr. Henderson to not disclose  
9 Brady information.

10 Q. And you've heard of the case Michael  
11 Sample versus State?

12 A. I've heard of it. I don't recall the  
13 details of it.

14 Q. It was actually a case that was tried  
15 way before you became district attorney.

16 A. That's why I don't recall the details  
17 of it.

18 Q. In November of 1982 Tom Henderson  
19 tried that case?

20 A. I would have no idea.

21 Q. Actually your --

22 A. That was 14 years, speaking 14 years  
23 before I took office. So, I would have no idea  
24 whether he was involved in that case. I don't

1 know.

2 Q. Tom Henderson got a conviction against  
3 Michael Sample for first degree murder?

4 A. If you say so.

5 Q. And, he obtained a death sentence?

6 A. If you say so.

7 Q. Later Michael Sample filed a  
8 precondition petition to set aside his  
9 conviction and sentence?

10 A. I would not know about that.

11 Q. And that petition was denied?

12 A. I mean, frankly, during the time I was  
13 D.A., we handled over a million cases. I was  
14 not really focussed on cases that had been  
15 handled 14 years prior to me taking office.

16 Q. Well, the case came back up while you  
17 were in office. In 1995, Mr. Sample filed  
18 another petition for new -- new information,  
19 allegedly Tom Henderson presented false  
20 testimony at trial, and suppressed exculpatory  
21 evidence, are you aware of that?

22 A. No.

23 Q. And the new information had been  
24 obtained by you from the Public Records Act, are

1       you familiar with Public Records Act?

2           A.       Oh, yes.

3           Q.       And that petition was again denied.

4       But on September 30th 1996, shortly before you  
5       took office, the Court of Criminal Appeals  
6       remanded the case. The Court rendered that the  
7       information Sample had obtained was, quote,  
8       previously suppressed police records and  
9       statements.

10               The Court also noted that Mr. Sample  
11       could not raise the claims previously, because  
12       they were unavailable due to the State's  
13       suppression of evidence.

14               By the time the proceeding came back  
15       down to the criminal court in Shelby County, you  
16       were the Shelby County district attorney;  
17       correct?

18           A.       I don't know. When did that come  
19       back?

20           Q.       It got remanded by the Court in  
21       September 30th 1996, so by the time proceedings  
22       got going, November 1996, you were --

23           A.       Correct.

24           Q.       And Mr. John Campbell was assigned to

1 represent your office in that case; correct?

2 A. I really don't recall.

3 Q. Okay.

4 A. I have no reason to dispute that.

5 Q. During your tenure, Mr. John Campbell  
6 handled many of the capital cases --

7 A. Absolutely.

8 Q. Your office took the position that the  
9 allegations of Tom Henderson presenting false  
10 testimony and suppressing exculpatory evidence  
11 should not be on the merits, are you aware of  
12 that?

13 A. No, I don't recall that.

14 Q. Okay. Your office took the position  
15 that the allegations came too late --

16 A. I really don't recall. Again, it  
17 involved a case that was initially handled  
18 before I took office, so I probably would not  
19 have known as much about the details of that  
20 case.

21 Q. But it's a capital post-conviction  
22 case being handled by your office; correct?

23 A. Yes.

24 Q. And it's a death penalty case,

1 someone's life is at stake; correct?

2 A. Correct.

3 Q. And so your office is the one who made  
4 the determination about whether to say  
5 (unintelligible) be heard on the merit,  
6 regardless of how meritorious they are, or  
7 whether the due process requires it be heard;  
8 correct?

9 A. It would have been the D.A.'s office  
10 making that decision as to how to approach that  
11 case; that is correct.

12 Q. At your office?

13 A. Correct.

14 Q. And the Court once again refused to  
15 hold a merit hearing in 1999 while you were  
16 Shelby County district attorney; correct?

17 A. Again, I don't recall that case, so I  
18 can't really verify that date with you. I'm not  
19 disputing it, though.

20 Q. Okay. In an August 2nd 2002 opinion,  
21 the Tennessee Supreme Court reversed and  
22 remanded the case. That is a published opinion,  
23 it has your name on it as the district attorney,  
24 are you aware of that?

1           A.       I'm not aware of that specific date or  
2           anything, but I -- but I'm not disputing that  
3           here. You can show it to me if you want to.

4           Q.       Okay. For the record that is Sample  
5           versus State, 82S.W.3d267, August 2nd 2002. If  
6           you could turn to Page 274 of the citation.

7           A.       Okay. One second. Okay. What page?  
8           I'm sorry.

9           Q.       It's actually 274, so it's the  
10          footnotes from the Southwest citation, it's  
11          probably marked with a yellow mark.

12          A.       Yeah.

13          Q.       Okay. The Tennessee Supreme Court  
14          stated that the post-conviction petition filed  
15          by Sample was accompanied by exhibits and  
16          records which were, "replete with apparent  
17          exculpatory evidence"; is that correct?

18          A.       Let me read it.

19          Q.       Okay.

20          A.       Okay.

21          Q.       Okay. And the Court actually  
22          discussed several items of evidence which were  
23          exculpatory; correct?

24          A.       Yes.



1 Q. Now, as D.A., you were aware of the  
2 Supreme Court decision in August 2002 remanding  
3 in a capital murder case because of the office's  
4 previous suppression of exculpatory evidence?

5 A. I'm sure I was at the time, but  
6 frankly as we're sitting here today, I do not  
7 recall this case.

8 Q. Okay.

9 A. I mean, it has been nine years.

10 Q. And do you recall that on remand, John  
11 Campbell again represented your office in the  
12 post-conviction proceedings?

13 A. I really don't recall that.

14 Q. Are you aware that your office  
15 stipulated that the materials which Sample  
16 obtained in 1993 through the Open Records Act  
17 and attached to your position came from your  
18 offices file?

19 A. I do not know.

20 Q. Would you like to see Judge's order in  
21 the case?

22 A. If you want me to.

23 Q. Okay.

24 A. Okay.

1           Q.       And your office's position was that  
2       Michael Sample's conviction and death sentence  
3       should be upheld; correct?

4           A.       I really don't recall the specific  
5       case.

6           Q.       Okay. And you did not remove Tom  
7       Henderson from his position, despite knowing  
8       that Tom Henderson withheld exculpatory  
9       evidence?

10          A.       I do not -- I really don't recall the  
11       details of the case.

12          Q.       Okay. And your office asserted their  
13       position, despite Tom Henderson presenting  
14       testimony that was directly contradictory to  
15       information in his file?

16          A.       Again, I don't recall the specific  
17       case. I hope you understand that. Again, we're  
18       dealing with over a million cases during the  
19       time that I was district attorney.

20          Q.       Okay. And but you were the ultimate  
21       decision maker as to capital murder cases you  
22       said earlier?

23          A.       I was the ultimate decision maker in  
24       whether or not to give the jury the option of

1 imposing the death penalty.

2 Q. Were you the ultimate decision maker  
3 as to whether your office would seek corrective  
4 or remedial action if your office suppressed  
5 exculpatory evidence or presented false  
6 testimony?

7 A. Well, I'll answer it this way, and we  
8 talked about this earlier, if at any time there  
9 was any indication that there was an intentional  
10 act on the part of any prosecutor not to reveal  
11 exculpatory evidence, I would expect that to be  
12 brought to my attention to take appropriate  
13 action.

14 Q. Okay. So, you are making a  
15 distinction between a prosecutor who, no matter  
16 how many times negligently or unknowingly  
17 suppresses Brady evidence, and a distinction  
18 between a prosecutor who knowingly withholds  
19 exculpatory --

20 A. I feel that there is a distinction  
21 there in terms of any disciplinary action that  
22 would be taken against the prosecutor, yes.

23 Q. And Judge Kraft, the order I just  
24 showed you, Judge Kraft on September 12th 2008

1       denied and remanded the post-conviction petition  
2       Mr. Sample filed. However, Judge Kraft found  
3       that your office had suppressed favorable  
4       evidence, are you aware of that finding?

5           A.       No.

6           Q.       And specifically that would have been  
7       Tom Henderson that had suppressed favorable  
8       evidence?

9           A.       Are you asking me?

10          Q.       Yes.

11          A.       I do not recall that specific case, so  
12       I really can't answer that.

13          Q.       Would you have wanted it brought to  
14       your attention if Tom Henderson had suppressed  
15       favorable evidence in a capital murder case?

16          A.       If he had done so intentionally, yes.

17          Q.       And Judge Kraft specifically found  
18       that your office suppressed eye witness Melvin  
19       Rouse's [phonetic] statement to Memphis Police  
20       Officer Welch, and that that statement was  
21       favorable evidence; correct?

22          A.       I have -- I do not know.

23          Q.       Okay. And the judge -- since you have  
24       no personal knowledge, but is reflected already

1 in the record in this case, the judge actually  
2 found several other items to be favorable  
3 evidence that was suppressed by Tom Henderson?

4 A. And again, I really can't comment on  
5 that because I do not recall this specific case.  
6 I don't mean to shorten you. You can keep  
7 asking me questions about this case, but I don't  
8 recall this specific case, so I'm not going to  
9 be able to give you any specific answers.

10 Q. Okay. And after the September 12th  
11 2008 order, you did not remove Tom Henderson  
12 from his position as administrative assistant --

13 A. No.

14 Q. -- in charge of the criminal courts?

15 A. No, I did not.

16 Q. And you did not place any reprimand in  
17 Tom Henderson's personnel file as a result of  
18 his suppression of favorable evidence?

19 A. No.

20 Q. Are you familiar with the Erskine  
21 Johnson case? That's --

22 A. Is that one of those that goes back to  
23 the 1980's?

24 Q. You're correct. You're correct.

1 Erskine Johnson was tried in 1985, or prior to  
2 your tenure.

3 A. I really have no memory of that case  
4 either. Again, I hope you understand that my  
5 plate was pretty full, handling the huge volumes  
6 of cases that began during my tenure.

7 Q. Okay.

8 A. So, I hope you understand that.

9 Q. So, you understand, the reason I'm  
10 asking about this case again, similar to the  
11 other cases, that it does, issues come up that  
12 are addressed and decided during your tenure.  
13 Okay?

14 A. Okay.

15 Q. Okay. And in that case, the Shelby  
16 County district attorney's office successfully  
17 obtained a first degree murder conviction, and  
18 successfully obtained a death penalty. Later  
19 Mr. Johnson filed a post-conviction petition,  
20 and in that post-conviction petition, he alleged  
21 that your office withheld a police report that  
22 was favorable. Do you recall whether you were  
23 ever made familiar with that?

24 A. I don't recall whether or not I was.

1 Again, when post-conviction matters came to our  
2 attention, the appropriate person, usually Mr.  
3 Campbell, would bring to my attention things he  
4 felt I needed to know. But as we're sitting  
5 here today, I can't recall whether he brought  
6 this particular matter to my attention at the  
7 time. He very may well have.

8 Q. And the post-conviction hearing on the  
9 allegation that the office suppressed Brady  
10 evidence were held in December 1996 and in early  
11 1997. And so, at that point you were the  
12 district attorney.

13 A. Yes, barely.

14 Q. Okay. And as you pointed out, Mr.  
15 Campbell was assigned to that particular case?

16 A. I don't know if he was or not. It  
17 would not surprise me if he had been assigned to  
18 that.

19 Q. Okay. Once again, this involved a  
20 recorded opinion which lists your name and Mr.  
21 Campbell's name?

22 A. Okay.

23 Q. CCA and that's the Supreme Court.

24 A. Okay.

1           Q.       Okay. And your office did not dispute  
2       that at trial Mr. Johnson requested exculpatory  
3       evidence and that your office's response was  
4       that it didn't have any. Your office's position  
5       was that Erskine Johnson's conviction and death  
6       sentence should be upheld.

7                   Now, once again, when your office's  
8       position was taken in 1996 and 1997 in that case  
9       and Mr. Campbell came to court and argued that,  
10      were you the ultimate decision maker to decide  
11      you would seek to uphold the conviction and  
12      death sentence?

13          A.       Well, yes, but again, this was over  
14      ten years ago and I do not recall the details of  
15      this case at this point.

16          Q.       In the Opinion before you, the Court  
17      of Criminal Appeals, on August 12, 1999, found  
18      that the State improperly withheld material  
19      exculpatory evidence, the police report we  
20      discussed, relating to the penalty phase of the  
21      trial. Is that your understanding of the  
22      Court's decision in that case?

23          A.       Let me read it. It would appear that  
24      the Court of Appeals held that exculpatory



1 evidence was improperly withheld relating to the  
2 penalty phase.

3 Q. And reviewing that opinion, can you  
4 also see where the Court found that exculpatory  
5 evidence related to the guilt phase was also  
6 suppressed by your office, and yet the Court  
7 found it in the penalty phase, exculpatory  
8 evidence (unintelligible) case, is that a case  
9 that you --

10 A. Somewhat.

11 Q. Once again, she was tried --

12 A. Again, that occurred --

13 Q. In 1986, she was tried?

14 A. Correct. I was happy in private law  
15 practice then.

16 Q. And the State, your office obtained a  
17 conviction and death sentence on first degree  
18 murder?

19 A. If I recall, that is correct, even  
20 though --

21 Q. And your office -- office filed a  
22 post-conviction petition alleging a Brady  
23 violation for failure to turnover letters  
24 between a husband and a lover, do you recall

1       that?

2           A.       No.

3           Q.       Do you recall that on February 25th  
4       2009, the United States Court of -- I'm sorry,  
5       the U.S. Court of Appeals for the Sixth Circuit  
6       made a finding that the district attorney's  
7       office withheld the letters, and that they were  
8       favorable?

9           A.       I do recall something about that, yes.

10          Q.       However, the Court found that she was  
11       not prejudiced, and upheld her death sentence?

12          A.       As I recall, that is correct.

13          Q.       Okay. Were you aware that the  
14       dissenting Judge stated that the prosecutors  
15       covered up the exculpatory information and lied  
16       to the trial Court and opposing counsel?

17          A.       No.

18          Q.       Were you aware --

19          A.       I was aware of the opinion, but I do  
20       not recall reading the dissenting opinion upon  
21       -- I may have at the time, I just don't recall.

22          Q.       And the dissenting judge also noted,  
23       "This set of falsehoods is typical of the  
24       conduct of the Memphis district attorney's

1 office during this period."

2 Were you aware that a statement to  
3 that effect was made?

4 A. Again, I may have read it at the time,  
5 but I don't recall.

6 Q. Okay. And --

7 A. I assume he's referring to the period  
8 of the mid 1980's.

9 Q. He was referring to the 1980's,  
10 correct.

11 A. And again, I was not in the office at  
12 the time, so I really -- I really can't comment  
13 on that.

14 Q. In fact, you specifically cited the  
15 next case I'm going to ask you about as an  
16 example of that. Gary Cohen, have you heard --

17 A. I'm aware.

18 Q. He was tried in 1982, once again,  
19 before your tenure. Once again, he also was  
20 sentenced to death, and the office successfully  
21 obtained the first degree murder conviction, as  
22 well as the death sentence, and he once again  
23 also filed post-conviction petitions.

24 On December 9th 2008, Cohen versus

1 Bell, that case was argued in the United States  
2 Supreme Court, and (unintelligible) conducted  
3 it, were you aware of that?

4 A. As as a district attorney, were you  
5 aware of that argument, and that the conduct of  
6 the Shelby County District Attorney's office was  
7 criticized by the members of the United States  
8 Supreme Court?

9 A. I am aware of that.

10 Q. Okay. On January 25th 2009, the  
11 Commercial Appeal ran an article called, "Life  
12 and Death, Reforms of Tennessee's Capital  
13 Punishment Process Face Rough Trials." If you  
14 could take a minute to look at that. You're  
15 quoted in that article on Page 3.

16 A. Correct. I'm getting there.

17 Q. Just to let you know.

18 A. All right. The column, I've not read  
19 every word, but I think I get the gist of it.

20 Q. Just a couple of questions as a  
21 background. The article describes the United  
22 States Supreme Court as, "incredulous and angry"  
23 about the Shelby County District Attorney's  
24 office withholding important evidence at the

1 time of trial?

2 A. That's the quote in the article, in  
3 the column, yes.

4 Q. Was that also the gist of the  
5 information that you were receiving about the  
6 argument at that time?

7 A. To some degree. But I was, I was  
8 certainly aware of this, yes.

9 Q. And then on Page 3 of the West Law  
10 version that I gave you down toward the end,  
11 you're quoted as objecting to reform which would  
12 require open file discovery in capital cases?

13 A. That is incorrect.

14 Q. It's not. Okay. You do not object?

15 A. We have an open files policy, that is  
16 our policy, that we want to share all discovery  
17 as much as possible, and as quickly as possible.  
18 That is our policy.

19 What I said was that I had concerns  
20 about a written protocol, because frankly, if  
21 you have a written protocol, the minute you  
22 deviate from that written protocol, you are  
23 raising a lot of issues that might not have  
24 merit.

1           But it is our policy, or was our  
2           policy in the district attorney's office during  
3           the time that I was there, that we needed to  
4           have full discovery sooner, rather than later.

5           Q.       Than at what --

6           A.       What I was saying in this article is,  
7           to have a written protocol that certain things  
8           would happen at certain times, creates a  
9           situation where if you deviate from that a  
10          little bit, you create a lot of unnecessary  
11          issues.

12          Q.       And on what date did your office  
13          institute an open discovery policy?

14          A.       That's been our policy pretty  
15          consistently. I don't remember a date. We've  
16          discussed that in numerous meetings in the  
17          office over many years.

18          Q.       And so, from your take on 1996  
19          forward, your office had an open file discovery  
20          in place?

21          A.       I would say that that was basically  
22          the practice that was encouraged among all.

23          Q.       And so, there was open file discovery  
24          in place during the trial and pretrial process

1 in Dan Jones's case?

2 A. I would say so, yes.

3 Q. Okay. And in the article you are  
4 quoted as saying that "Prosecutors are committed  
5 to their obligation to provide exculpatory  
6 evidence; is that correct?

7 A. Absolutely.

8 Q. Okay. And your opposition to a  
9 particular -- to having a written policy to open  
10 file discovery to correct the problem of a  
11 prosecutor suppressing favorable information, is  
12 -- I should rephrase that.

13 A. Well, as I explained in the column,  
14 where I say, and I'm quoted here, "the minute  
15 you deviate, you raise an issue that doesn't  
16 have merit."

17 Q. Okay. So, you do object to a written  
18 policy requiring open file discovery?

19 A. I think to have a written detailed  
20 protocol simply creates a lot of issues  
21 unnecessarily if that protocol is deviated from  
22 in any given case.

23 Q. And would you agree, that having an  
24 open file discovery and a written protocol for

1 open file discovery would assist in correcting  
2 the problem of prosecutors suppressing favorable  
3 evidence?

4 A. No. I think having an open file policy  
5 is a good policy. I think having a detailed  
6 written protocol is not a good policy. That's  
7 my opinion. And I realize different district  
8 attorneys would have different opinions on that.

9 Q. And yet open file discovery did not  
10 prevent Tom Henderson from violating his  
11 discovery obligations and disclosing exculpatory  
12 evidence in the Dan Jones case; correct?

13 A. I don't believe that's correct at all.

14 Q. You do understand that the judge  
15 granted a mistrial because Mr. Henderson  
16 withheld exculpatory evidence from his counsel?

17 A. As I recall in that case, and again, I  
18 was not involved in the day-to-day details of  
19 the case, but as I recall in that case, it was a  
20 situation where Mr. Henderson missed some  
21 evidence in the case, but so did the defense  
22 lawyer who had access to that information.

23 Q. Is that --

24 A. And there was open discovery, it was



1       there, and the defense lawyer missed it as well  
2       as I recall.

3           Q.       But the Court's finding was that Mr.  
4       Henderson, for the first time, disclosed in the  
5       middle of the trial, information which he had  
6       previously not disclosed, (unintelligible) the  
7       way it was exculpatory and required a mistrial.  
8       That is what the order says.

9           A.       And as I also recall, correct me if  
10      I'm wrong, that there was no finding that Mr.  
11      Henderson had committed any wrongdoing  
12      intentionally.

13          Q.       Did they --

14          A.       And again, as I recall, and you can  
15      correct me if I'm wrong, that in that case  
16      regarding the exculpatory evidence, the defense  
17      lawyer had access to that evidence. So, it was  
18      an unfortunate situation where both sides missed  
19      it.

20          Q.       On April 28th 2009, the United States  
21      Supreme Court issued its decision in Gary  
22      Cohen's case. The Supreme Court found that the  
23      district attorney's office suppressed  
24      exculpatory evidence that affected the Erskine

1 Johnson trial, and remanded the case, were you  
2 aware of that?

3 A. Yes.

4 Q. And the Supreme Court also found that  
5 the procedural bars that the State of Tennessee,  
6 including your office, had tried to place to  
7 reject Gary Cohen's claims on the merits were  
8 erroneous?

9 A. I would have to go back and -- I read  
10 the opinion at the time, and I can sit here and  
11 read it again, but I'm not disputing what you  
12 just said.

13 Q. Okay. And you would agree as a  
14 district attorney that it's troublesome that a  
15 capital murder case would have to be remanded  
16 twenty, thirty years after it was tried because  
17 a district attorney withheld exculpatory  
18 evidence?

19 A. We don't necessarily agree with the  
20 Supreme Court's decision, but we accept it.

21 Q. Your office indicted Michael Rimmer on  
22 murder charges in 1998, do you recall that?

23 A. Yes.

24 Q. You signed the indictments in that

1 case; correct?

2 A. Correct.

3 Q. And you made the ultimate decision to  
4 seek the death penalty against Michael Rimmer?

5 A. That is correct.

6 Q. Tom Henderson was involved in the case  
7 from the beginning; is that correct?

8 A. As I recall, he was.

9 Q. And Tom Henderson, with the assistant  
10 district attorney, had handled pretrial  
11 discovery?

12 A. As far as I know, he was, that is  
13 correct.

14 Q. Are you aware that Tom Henderson filed  
15 discovery responses in 1998 stating that the  
16 State had no evidence which was favorable to the  
17 defendant to disclose?

18 A. As I recall, that is correct.

19 Q. Are you aware that Tom Henderson in  
20 1998, in apparent violation of what you describe  
21 as open file discovery, denied the defendant  
22 discovery of anything other than what was  
23 required under the Rule 16 --

24 A. I'm not aware of any of the details

1 with what he -- of that, no.

2 Q. If the record reflects that Mr.  
3 Henderson, as a district attorney from your  
4 office assigned to that case, filed responses  
5 indicating that no discovery other than Rule 16  
6 would be provided, would you dispute what that  
7 was?

8 A. Well, when I say open discovery, I  
9 mean discovery that is -- that should be made in  
10 accordance with the rules. That's maybe where  
11 we're having a disagreement over what we mean by  
12 open discovery. But all discovery should be  
13 made available under the rule.

14 Q. So, you would not have then -- for  
15 example, police reports are not discoverable  
16 under the rules, your office does not have a  
17 policy to provide police reports to defense  
18 counsel?

19 A. Our policy is, again, I would leave  
20 that up to the individual prosecutors. But it  
21 is to make open discovery as promptly as  
22 possible, of everything that should be made  
23 available under the rules.

24 Q. And --

1           A.       And in some cases there are probably  
2       some prosecutors who go beyond that requirement.  
3       That would be a case-by-case. But the main  
4       thing is to make sure they meet their  
5       obligations under the rules.

6           Q.       Those are the discovery rules, the  
7       Brady rules, and the Rules of Professional  
8       Conduct 3.8?

9           A.       Correct.

10          Q.       Mr. Rimmer was tried in November of  
11       1998, do you recall that?

12          A.       I recall it was in that time period,  
13       yes.

14          Q.       And actually it was a case that  
15       received a lot of publicity; correct?

16          A.       Correct.

17          Q.       One of the reasons why, is that Ricci  
18       Ellsworth has never been found.

19          A.       Right.

20          Q.       So, that was actually the first case  
21       your office tried in which there was no body?

22          A.       I believe that's correct.

23          Q.       There was another case that was in  
24       that same time frame, but it was not tried as a

1 capital case?

2 A. I believe that's correct.

3 Q. Were you aware that the Federal  
4 Government actually, the district attorney -- or  
5 the Department of Justice in Memphis was also  
6 involved in the case and considering prosecution  
7 if Mr. Henderson was unable to obtain a  
8 conviction and death sentence?

9 A. I'm sure I was aware of that at the  
10 time.

11 Q. Do you recall if you had any  
12 discussions with the Department --

13 A. U.S. Attorney, I just don't recall.

14 Q. U.S. Attorney, you don't recall, okay.  
15 And Tom Henderson was able to obtain a  
16 conviction against Mr. Rimmer for first degree  
17 murder, is that your recollection?

18 A. Yes.

19 Q. And he successfully argued for a death  
20 sentence?

21 A. As I recall, that is correct.

22 Q. And Mr. Rimmer appealed and received a  
23 new sentencing trial, are you aware of that?

24 A. Correct.

1 Q. Are you aware that prior to Mr.  
2 Rimmer's new sentencing trial, Tom Henderson,  
3 operating as a representative of your office,  
4 filed responses to Mr. Rimmer's discovery  
5 request and request for exculpatory evidence,  
6 stating that the State had no evidence which was  
7 favorable to the defendant?

8 A. I believe that is correct.

9 Q. And Mr. Rimmer was retried in January  
10 of 2004, is that consistent with your  
11 recollection?

12 A. That sounds about right.

13 Q. And once again, you personally  
14 authorized Mr. Henderson as a representative of  
15 your office, seeking the death penalty against  
16 Michael Rimmer?

17 A. Correct.

18 Q. And he successfully argued for the  
19 death sentence; correct?

20 A. Correct.

21 Q. The case was appealed and the  
22 Tennessee Supreme Court affirmed the sentence in  
23 2008, were you aware of that?

24 A. I don't recall the exact date but I'm

1       aware of that ruling, yes.

2           Q.       And are you aware that Mr. Rimmer  
3       filed a pro se post-conviction petition in 2008  
4       to set aside his conviction and sentence?

5           A.       Again, I'm not aware of the exact  
6       date, but I'm aware of that filing, yes.

7           Q.       And are you aware that John Campbell  
8       was assigned to represent your office in the  
9       post-conviction case?

10          A.       Yes.

11          Q.       Are you aware that a hearing was held  
12       in August of 2009 on Michael Rimmer's motion for  
13       discovery of exculpatory evidence?

14          A.       I do not recall that specific hearing,  
15       no.

16          Q.       Okay. After that hearing, I requested  
17       Mr. Campbell to discuss with you  
18       disqualification of your office in prosecuting  
19       the case, do you recall any discussions?

20          A.       I recall us discussing that at some  
21       point.

22          Q.       Do you recall whether Mr. Tom  
23       Henderson was involved in those discussions?

24          A.       I don't believe he was now, that is my



1 recollection.

2 Q. Were you the ultimate decision maker  
3 who decided that your office would not  
4 disqualify and oppose disqualification?

5 A. Yes.

6 Q. Okay. And were you aware that Mr.  
7 Rimmer then filed a formal written motion to  
8 disqualify your office?

9 A. I'm aware that such motion was filed  
10 at sometime, at some point, yes.

11 Q. And were you aware, that in support of  
12 that request, numerous transcripts and technical  
13 records from the previous trials and so forth  
14 were attached to the --

15 A. I'm not aware of that, but I assume  
16 that would be the case.

17 Q. Okay. Were you aware that Tom  
18 Henderson introduced at Mr. Rimmer's trial,  
19 testimony from the lead detective Memphis police  
20 detective Robert Shemwell, that eyewitness Army  
21 sergeant James Darnell was shown a photo line up  
22 of suspects prior to Mr. Rimmer's trial?

23 A. Repeat that question.

24 Q. Okay. It's a long question, I

1 apologize.

2 A. That's all right.

3 Q. Were you aware that Tom Henderson  
4 presented information through Detective Shemwell  
5 at trial that the eye witness, James Darnell,  
6 was shown a photographic line up of suspects?

7 A. Yes.

8 Q. Okay. Were you aware that at the  
9 trial, Tom Henderson presented testimony from  
10 that witness that the eyewitness James Darnell  
11 did not positively identify anyone from the  
12 photographic line up?

13 A. I am aware of that testimony by the  
14 officer, yes.

15 Q. And were you aware that that testimony  
16 came after Judge Axley ordered Tom Henderson to  
17 review his entire file along with Detective  
18 Shemwell?

19 A. As I recall, that is correct.

20 Q. Were you aware that there was a  
21 two-hour break in order for Tom Henderson and  
22 Detective Shemwell to review the files?

23 A. Yes. And I do not recall, frankly,  
24 know whether the defense counsel also reviewed

1 it during that time period. I do not know.

2 Q. The transcript reflects that that is  
3 not the case.

4 A. Okay.

5 Q. The transcript reflects that the  
6 defense counsel was vigorously attempting to get  
7 that information. Tom Henderson assured the  
8 Court when he returned from the file review,  
9 that he had no information that Darnell had  
10 positively identified anyone from the photo line  
11 up, are you aware of that?

12 A. I am aware of that.

13 Q. Okay. In fact, are you aware that eye  
14 witness James Darnell was shown a photo line up  
15 of suspects in May of 1997?

16 A. I did recall that.

17 Q. And that he was again shown a photo  
18 line up in June of 1997?

19 A. I don't know the exact dates, but I'm  
20 aware that that --

21 Q. And that he was asked to sign the back  
22 of the person that he identified in the photo  
23 line up?

24 A. I'm not aware of that.

1 Q. Were you aware that there were photos  
2 of Michael Rimmer in the photographic line up?

3 A. Not specifically aware of that, no.

4 Q. And that James Shemwell did not  
5 identify Michael Rimmer in any way?

6 A. I'm not aware that Michael Rimmer was  
7 in the photo line up.

8 Q. And to be clear, when I'm referencing  
9 eyewitness James Darnell, are you aware that  
10 James Darnell was a career Army sergeant who was  
11 at the Memphis Inn at the time Ricci Ellsworth  
12 disappeared, he saw two men with blood on their  
13 hands, one in the supposedly locked office where  
14 Ricci was supposed to be, and one outside,  
15 exchanging money through the window?

16 A. I do not recall the specifics.

17 Q. Okay. Are you aware that James  
18 Darnell did identify someone out of that  
19 photographic line up?

20 A. As I recall, that is correct.

21 Q. Okay. And in fact, he signed the  
22 photo line up?

23 A. I'm not aware of that. I'm not aware  
24 of that.

1 Q. Okay. Are you aware that James  
2 Darnell identified photo double-A number five as  
3 one of the two men he saw with blood on his  
4 hands?

5 A. I'm not aware of that.

6 Q. Have you been informed that double-A  
7 number 5 is a man named Billy Wayne Voyles,  
8 V-O-Y-L-E-S?

9 A. No.

10 Q. Okay. Were you aware that Memphis  
11 Police Department supplements indicate that they  
12 were -- they knew of the identification of  
13 Voyles by Sergeant Darnell?

14 A. No.

15 Q. Were you aware that the supplements  
16 had been introduced into evidence already at  
17 post-conviction at the motion for disclosure of  
18 exculpatory evidence?

19 A. I'm not aware of that, but I guess I'm  
20 not surprised.

21 Q. Are you aware that the supplement that  
22 has been introduced into evidence in this case  
23 thus far, reports that Tom Henderson was  
24 immediately informed of the identification of

1 the eye witness Sergeant James Darnell of Billy  
2 Wayne Voyles?

3 A. When you say immediately, it means  
4 when?

5 Q. May 30th 1997. As soon as the Memphis  
6 Police Department were apprised of the  
7 identification of Billy Voyles?

8 A. I do not recall that.

9 Q. Were you aware that the police  
10 supplement indicates that Tom Henderson came to  
11 the homicide office that same day, and was  
12 personally alerted at the office to Darnell's  
13 identification of Voyles?

14 A. I'm not aware of that.

15 Q. You described his role previously in  
16 the homicide office, as someone who would do  
17 this sort of thing, correct, someone who would  
18 immediately inform that we have a good suspect,  
19 the eyewitness in a capital murder case has  
20 identified a suspect, one of the two murderers?

21 A. He would have been one of the  
22 individuals with whom the homicide bureau would  
23 have consulted.

24 Q. It would have been Jerry [phonetic]

1 Harris and Tom Henderson at that time?

2 A. At that time period.

3 Q. Tom -- are you aware that Tom  
4 Henderson authorized the extradition of Voyles  
5 on a pending capias after he was alerted to that  
6 identification?

7 A. I'm not aware of that.

8 Q. Are you aware that we had introduced  
9 into evidence a signed written authorization of  
10 extradition by Tom Henderson?

11 A. I am not.

12 Q. And are you aware that the reason that  
13 Voyles could be extradited was the capias on  
14 previous charges that he had absconded on which  
15 were attempted murder and robbery?

16 A. I'm not aware of that.

17 Q. Now, you made the ultimate decision in  
18 this case to oppose disqualification of your  
19 office from prosecuting the case; correct?

20 A. That's correct.

21 Q. And were you informed of the specific  
22 allegations that Tom Henderson introduced false  
23 testimony?

24 A. I was informed of the officer's

1 testimony at trial, if that's what you're  
2 referring to, yes.

3 Q. Are you aware that --

4 A. I am -- I was at no time informed that  
5 Mr. Henderson knew at that time that it was  
6 false testimony.

7 Q. To clarify, because you weren't aware  
8 of some of the facts that -- from the evidence  
9 was introduced, were you aware that Tom  
10 Henderson was immediately identified as soon as  
11 the Memphis police knew that Darnell had  
12 identified Billy Wayne Voyles?

13 A. Okay. Say that again.

14 Q. Were you told -- you were told that  
15 apparently that Shemwell testified falsely, that  
16 there was no identification when in fact there  
17 was?

18 A. Correct.

19 Q. Were you told that Tom Henderson was  
20 immediately told by the Memphis police  
21 department, that James Darnell had identified  
22 Billy Wayne Voyles?

23 A. If I was told, I do not recall that.

24 Q. Okay. And were you told that Tom



1 Henderson had personally authorized the  
2 extradition of Billy Wayne Voyles because of  
3 that?

4 A. I do not recall being told that.

5 Q. Were you informed that Tom Henderson,  
6 prior to the false testimony that he elicited  
7 from Detective Shemwell, told Judge Axley that  
8 he'd reviewed the entire case file with  
9 Detective Shemwell?

10 A. Yes, I'm aware of that.

11 Q. On September 18th of 2009, your office  
12 filed a written response to the motion to  
13 disqualify, objecting to the disqualification of  
14 the office. The motion categorically denied  
15 that Tom Henderson suppressed exculpatory  
16 evidence, were you aware of that? I can show it  
17 to you.

18 A. I'm aware of that.

19 Q. Okay. And the motion categorically  
20 denied that Tom Henderson knowingly presented  
21 false testimony, are you aware of that?

22 A. Yes.

23 Q. And does that response accurately  
24 reflect your position in this capital

1 post-conviction case?

2 A. Yes, it does.

3 Q. After learning of this information  
4 that there was exculpatory evidence -- well,  
5 let's stick to the false testimony. After  
6 learning that false testimony was presented at  
7 the capital murder trial of Mr. Rimmer and what  
8 had happened in this case, you did not remove  
9 Tom Henderson from his position as  
10 administrative assistant in charge of criminal  
11 courts; correct?

12 A. No.

13 Q. And after learning of what's happened  
14 in this case, and the presentation of false  
15 testimony in a capital murder case, during your  
16 tenure, you did not place any reprimands in Tom  
17 Henderson's personnel file; correct?

18 A. That is correct. And to go back to  
19 the trial, is what I -- you need to take a break  
20 here?

21 Q. No.

22 A. As you pointed out, there was a break  
23 in trial while Mr. Henderson, along with the  
24 officer, reviewed the file to see if there was

1 any exculpatory evidence, and they did not find  
2 any. I believe that was accurate. I believe  
3 they did not find any. I have no reason to  
4 believe that Mr. Henderson was untruthful when  
5 he said that.

6 Q. And did you personally review the --  
7 your office's file?

8 A. No, I did not personally.

9 MS. GLEASON: Could we take a break?

10 (WHEREUPON, THERE WAS A BRIEF BREAK  
11 AFTER WHICH THE DEPOSITION RESUMED AS  
12 FOLLOWS.)

13 Q. (BY MS. GLEASON) Commissioner  
14 Gibbons, when you discussed earlier your  
15 distinction between knowing and unknowing  
16 failure to disclose favorable evidence,  
17 specifically as to the Michael Sample case, when  
18 that case was handled in post-conviction by Mr.  
19 Campbell representing your office and you were  
20 aware of that capital murder case, what steps  
21 did you take to determine whether Mr.  
22 Henderson's suppression of favorable information  
23 was knowingly or unknowingly?

24 A. I really don't recall at the time.

1 But again, if it comes to my attention in some  
2 way, based on a court ruling, for example, that  
3 a prosecutor has knowingly intentionally  
4 withheld exculpatory evidence, I would take  
5 appropriate action.

6 Q. Moving up on one of the -- to more  
7 recent times, as to the distinction between  
8 knowing and unknowing suppression of favorable  
9 evidence in the Dan Jones case, what steps did  
10 you take to determine whether Mr. Henderson's  
11 suppression of favorable evidence was knowing or  
12 unknowing?

13 A. As I recall in that case, and correct  
14 me if I'm wrong, because again, I've had -- I  
15 had a huge caseload during the time I was  
16 district attorney. But as I recall in that  
17 case, it was a situation where Mr. Henderson and  
18 defense counsel in the case both overlooked  
19 certain information.

20 Q. But you would agree, independent of --

21 A. And there was no finding in that case  
22 as I recall, that Mr. Henderson intentionally  
23 withheld any exculpatory information.

24 Q. Do you recall whether there was a

1 finding one way or the other as to whether it  
2 was intentional or unintentional?

3 A. I don't recall. But I would assume  
4 that if there was any finding by the judge that  
5 it was intentional, that would have certainly  
6 been a matter of record.

7 Q. And as the district attorney and the  
8 person responsible for Mr. Henderson's conduct,  
9 what steps did you take to determine whether Mr.  
10 Henderson knowingly withheld the favorable  
11 evidence in that case?

12 A. I basically relied upon the Court's  
13 decision in that case. And as I recall, there  
14 was no finding that he had intentionally engaged  
15 in any wrongdoing along those lines.

16 Q. So, there was no independent  
17 investigation by you or a member of your office?

18 A. No. I relied upon the Court's decision  
19 in that case.

20 Q. Is that also true as to Sample, or can  
21 you recall whether --

22 A. I really don't recall.

23 Q. Now, as to the Rimmer situation coming  
24 to your attention in August of 2009, what steps

1 did you take to determine whether the  
2 presentation of false testimony by Mr. Henderson  
3 was knowing or unknowing?

4 A. Well, again, there's nothing to my  
5 knowledge to indicate that it was knowing. And  
6 if there had been any indication that it was,  
7 then I would have taken steps on that.

8 Q. And what investigation did you conduct  
9 in order --

10 A. Mr. Campbell and I had discussed that  
11 case, obviously.

12 Q. And what investigation did you  
13 undertake to determine whether Mr. Henderson  
14 had --

15 A. You mean did I call Mr. Henderson in  
16 and interrogate him and ask him whether if  
17 actually this was a knowing and intentional act  
18 on his part, no, I did not interrogate him along  
19 those lines. But I looked at the decision in  
20 the case, and again, there was nothing in the  
21 record to so indicate.

22 Q. Okay. And so, you were willing to  
23 take Mr. Henderson on his word?

24 A. Well, in this case, of course it was

1 the testimony of the officer on the stand, as I  
2 recall, and the officer made a mistake  
3 apparently.

4 Q. And to be clear, you did not discuss  
5 with Mr. Henderson regarding whether it was  
6 knowing or unknowing presentation of false  
7 testimony?

8 A. I do not recall specifically asking  
9 that, but there was no indication whatsoever  
10 that Mr. Henderson intentionally put this  
11 officer on the stand to lie.

12 Q. And did you -- I think you answered  
13 this earlier, but just to be clear --

14 A. I said take that to lie, I mean, I'm  
15 not saying that the officer doesn't necessarily  
16 recall. But based on what appears to be the  
17 case now, is the officer's testimony was  
18 incorrect. And I'm not saying that the officer  
19 intentionally gave false testimony, I don't  
20 know.

21 Q. And did you personally, or did you  
22 have anyone else review the exhibits that have  
23 been introduced thus far that indicates that Mr.  
24 Henderson was personally aware of the

1 identification?

2 A. I'm not aware of that. Mr. Campbell  
3 is handling the case now, and you know, I'm sure  
4 he is reviewing all of that.

5 Q. So, when you made the decision to not  
6 -- not to agree to disqualification of office,  
7 when you made the decision to categorically deny  
8 any wrongdoing by Mr. Henderson, that was not  
9 the result of any investigation or review of the  
10 file documents?

11 A. It was not the result of any  
12 independent investigation by me. It was based  
13 on the facts as I knew them at the time. And no  
14 indication that he had done any wrongdoing. And  
15 no finding that he had done so.

16 MS. GLEASON: That is all. Thank you.

17 CROSS-EXAMINATION

18 BY MR. CAMPBELL:

19 Q. Just a couple of things. Now,  
20 Commissioner Gibbons, are you aware that  
21 currently the Rimmer case is pending a hearing  
22 on post-conviction?

23 A. Correct.

24 Q. And there has been no finding by the



1 court of any misconduct on the part of General  
2 Henderson?

3 A. That is my understanding.

4 Q. And in fact, that matter will be  
5 addressed at another day with an evidentiary  
6 hearing?

7 A. That is correct.

8 Q. At this point in time, these are  
9 allegations that have been made?

10 A. That is my understanding.

11 Q. Now, in regards to training, and  
12 you've talked about training that was done in  
13 the office, is there other training that is done  
14 in conjunction with the district attorney  
15 general's conference for attorneys and for trial  
16 practice and ethics in discovery?

17 A. Oh, yes. In addition to the in-house  
18 training that we have on a regular basis, or  
19 that we had, I'm no longer there, that we had  
20 when I was there, the Tennessee district  
21 attorney general's conference conducts annual  
22 training available to all state prosecutors in  
23 the state.

24 In addition to that, the National

1 District Attorney's Association also offers  
2 training through the national college, and a  
3 number of prosecutors have taken advantage of  
4 that.

5 Q. When you were asked about the Sample  
6 case, about Tom Henderson's involvement in the  
7 Sample case, and if I understand correctly, you  
8 just don't have, you have no recollection of  
9 that case?

10 A. I really don't.

11 Q. So, you would not know that Mr.  
12 Henderson was not the lead counsel on that case?

13 A. I would not know.

14 Q. Okay.

15 A. Given the fact that it was in the  
16 '80s, it would not surprise me he was not lead  
17 counsel.

18 MR. CAMPBELL: I believe that's all  
19 the questions I have.

20 REDIRECT EXAMINATION

21 BY MS. GLEASON:

22 Q. Were you aware that as to the Sample  
23 case, Don Strother was co-counsel with Mr.  
24 Henderson?

1           A.       That would make sense. And it would  
2       make sense that Mr. Strother would have been  
3       lead counsel.

4           Q.       And are you aware that Mr. Strother  
5       was the prosecutor in the Gary Cohen case and in  
6       the Gail Owens case?

7           A.       In the Gail Owens case, I was not  
8       aware of that. I thought James Chanley  
9       [phonetic] was, but I may be incorrect on that.

10          Q.       And are you aware that it was Mr.  
11       Strother's conduct that the Supreme Court found  
12       to be so appalling in its --

13          A.       I am aware of that, yes.

14          Q.       And Mr. Campbell mentioned the  
15       National District Attorney's Association?

16          A.       Yes.

17          Q.       You've been heavily involved in that  
18       organization; correct?

19          A.       Correct.

20          Q.       And in what role?

21          A.       I served on the board of directors of  
22       the organization until January of this year.

23          Q.       Okay.

24          A.       And as a vice president of the

1 organization.

2 Q. And is it true as I see from the  
3 website, that the mission of the National  
4 District Attorney's Association is -- there are  
5 multiple goals, but the primary one, the first  
6 one mentioned is: To foster and maintain the  
7 honor and integrity of the prosecuting attorneys  
8 in the United States.

9 A. I'm sure that is the mission. And  
10 also to provide prosecutors the knowledge,  
11 skills and support to ensure that justice is  
12 done. Because frankly, the role of the  
13 prosecutor is very different from the role of a  
14 defense lawyer. A defense lawyer's job is to  
15 create reasonable doubt wherever possible. I  
16 understand it's your job, it's the role of the  
17 prosecutor to do justice, which is a little  
18 different.

19 Q. And along those lines, I did have a  
20 question about that. One Court has described  
21 that particular duty in the role of a prosecutor  
22 as: "One of the finest offices the public can  
23 give to a member of the legal profession."

24 Would you agree with that?

1           A.       I'm sorry, what are you reading?

2           Q.       This is actually a case from Kentucky,  
3 where I used to practice.

4           A.       Yeah. I would absolutely agree with  
5 that statement.

6           Q.       Okay. And the Court goes on to say  
7 that the very status that a prosecutor has,  
8 becomes a mantle of power and respect to the  
9 (unintelligible). Would you agree with that?

10          A.       I'm sorry, what? Absolutely.

11          Q.       Okay.

12          A.       And I can say that as district  
13 attorney, I tried to instill that kind of  
14 attitude in all prosecutors.

15          Q.       And --

16          A.       And I think if you look at our office  
17 and if you look at Mr. Henderson, you will see  
18 there are many cases that were dismissed due to  
19 our conclusion that we did not have evidence to  
20 proceed. That would include cases that Mr.  
21 Henderson handled, by the way.

22          Q.       And the Court goes on to say: "No one  
23 except for the judge himself is under a stricter  
24 obligation to see that every defendant receives

1 a fair trial, a trial in accordance with the  
2 law."

3 Would you agree with that?

4 A. Our job is make sure that justice is  
5 done, that the guilty are pursued and that the  
6 innocent are protected.

7 Q. So, you would not agree that no one  
8 else, except for the judge is under a stricter  
9 obligation to see that every defendant receives  
10 a fair trial?

11 A. No, I would. I thought that's what I  
12 said.

13 Q. Okay. And in furtherance of the NDAA  
14 mission and the high importance and power and  
15 status and obligations of the prosecutor, you  
16 have in-house training on professional ethics?

17 A. Correct.

18 Q. And you sent your folks off to  
19 training with the district attorney general's  
20 conference?

21 A. Correct.

22 Q. And that included training in  
23 professional responsibility in legal ethics?

24 A. That is correct.

1 Q. And Mr. Henderson in particular, not  
2 only was your training director for some time,  
3 he also travelled around the country to train  
4 other district attorneys around the United  
5 States?

6 A. Absolutely.

7 Q. Okay. So, he is somebody who is  
8 highly educated, highly trained, and highly  
9 aware of all of his legal obligations and  
10 professional responsibility obligations?

11 A. That's correct. I would consider Mr.  
12 Henderson to be one -- be a prosecutor with  
13 extremely high ethical standards.

14 Q. And in fact, at one point during the  
15 Paul Reed cases, there were three different  
16 capital murder trials, one of the them was in  
17 Montgomery County, do you recall that?

18 A. Yes.

19 Q. Do you recall Mr. Henderson  
20 volunteering to assist in that trial?

21 A. Didn't exactly happen that way.

22 Q. Do you recall Mr. Henderson --

23 A. I recall the district attorney in  
24 Montgomery County calling me and asking me if he

1       could have Mr. Henderson's assistance. And I  
2       asked Mr. Henderson to provide that assistance.

3           Q.       And Mr. Henderson in fact, secured a  
4       death sentence in that case; correct?

5           A.       As I recall, he did but again, I was  
6       following it from afar but as I recall he did,  
7       yes.

8           Q.       And when there was a newspaper article  
9       that discussed Mr. Henderson's heavy importance  
10      and role in that case you distributed a memo to  
11      the entire office in September of 1999, saying  
12      that although Mr. Henderson was missed in your  
13      office, he clearly was where he needed to be, do  
14      you recall that?

15          A.       That would not surprise me at all and  
16      that when the district attorney of Montgomery  
17      County called me and asked for that assistance,  
18      I was glad to give it to him.

19                   MS. GLEASON: I have no further  
20      questions. Thank you.

21                   MR. CAMPBELL: Okay.

22                   FURTHER DEPONENT SAITH NOT.

23

24



## C E R T I F I C A T E

I, R. Michelle Huskey Smith, Court  
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